SALT LAKE INVESTMENT COMPANY *v.* OREGON SHORT LINE RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 29. Argued March 8, 1918.—Decided April 15, 1918.

Lands within the limits of an incorporated city, whether actually occupied or sought to be entered as a townsite or not, were excluded from acquisition under the Pre-emption Act.

An attempted pre-emption settlement on such land, and filing of declaratory statement in the local land office, do not affect the disposing power of Congress or operate to exclude the tract from subsequent grant of right of way "through the public lands," containing no excepting clause.

The Act of March 3, 1877, c. 113, 19 Stat. 392, did not confirm or provide for confirming such absolutely void pre-emption claims so as to disturb rights vested before the date of the act under a railroad right of way grant.

The act granting a right of way "through the public lands" to the Utah Central Railroad Company (c. 2, 16 Stat. 395,) applied to public lands over which the road had been constructed within the corporate limits of Salt Lake City but which never were occupied as a townsite or attempted to be entered as such. The Townsite Act is not inconsistent with this conclusion.

46 Utah, 203, affirmed.

THE case is stated in the opinion.

Mr. W. H. King, with whom *Mr. M. E. Wilson* and *Mr. E. A. Walton* were on the briefs, for plaintiff in error.

Mr. Henry W. Clark, with whom *Mr. George H. Smith* and *Mr. H. B. Thompson* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

A small parcel of land in Utah is here the subject of conflicting claims—one under a patent to Malcolm Mac-

duff issued under the pre-emption act, c. 16, 5 Stat. 453, and the other under an act, c. 2, 16 Stat. 395, granting a right of way "through the public lands" to the Utah Central Railroad Company. The court below sustained the latter claim, 46 Utah, 203, and the case is here on a writ of error allowed before the Act of September 6, 1916, c. 448, 39 Stat. 726, became effective.

Macduff's pre-emption claim was initiated by settlement June 10, 1869; his declaratory statement was filed in the local land office July 21 of that year; he paid the purchase price and secured an entry January 19, 1871, and the patent was issued June 6, 1871.

The right of way was granted December 15, 1870. At that time the railroad was completed and in operation for its full length. Cong. Globe, 41st Cong., 2d sess., 4512, 5635; *Moon* v. *Salt Lake County*, 27 Utah, 435, 442. It was constructed late in 1869 or early in 1870, after Macduff filed his declaratory statement and before he paid the purchase price or secured his entry.

Continuously after 1860 the tract sought to be pre-empted was within the corporate limits of Salt Lake City, as defined by a public statute, but was never actually occupied as a town site nor attempted to be entered as such. The parcel in controversy is within that tract, is also within the exterior lines of the right of way, and is occupied and used for right of way purposes.

The plaintiff in error is the successor in interest and title of Macduff and the defendent in error is the like successor of the Utah Central Railroad Company.

The pre-emption act, § 10, excluded from acquisition thereunder all lands "within the limits of any incorporated town." Thus the land which Macduff sought to pre-empt was not subject to pre-emption, and could no more be entered or acquired in that way than if it were in an Indian or military reservation. See *Wilcox* v. *Jackson*, 13 Pet. 498, 511. That it was not actually occupied as a

town site, nor sought to be entered as such, is immaterial. As Mr. Justice Miller pointed out in *Root* v. *Shields*, 20 Fed. Cas. 1160, 1166, Congress did not confine the exclusion to such lands as were so occupied, or such as were subject to town site entry, but "deemed the short way the best way,—to exclude them all from the operation of the act by a general rule." In that case the learned justice held a pre-emption entry of land within the corporate limits of Omaha "illegal and void," and said in that connection: "Again, the defect in the title was a legal defect; it was a radical defect. It was as if no entry had ever been made. By it Shields did not take even an equity. After he had gone through the process of making the entry, after he received the patent certificate, Shields had no more right, or title, or interest in the land than he had before. And as he had none, he could convey no interest in the land. By the deed which he made, and by the successive deeds which they received, his grantees took no more than he had, which was nothing at all."

In the case of *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, a plaintiff in ejectment relied on a patent issued under the homestead law, which adopted the excluding provision of the pre-emption act, and his title was challenged on the ground that the entry and patent were for land within the corporate limits of Minneapolis. This court observing, first, that the record affirmatively disclosed that the land was in the city limits when the claim was initiated, and second, that the case was not one where a finding by the Land Department on a question of fact resting on parol evidence was sought to be drawn in question, held the patent void under the general rule that "when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a

patent, transfer no title, and may be challenged in an action at law."

Applying these views, we think Macduff's settlement and declaratory statement under the pre-emption act were of no effect. They neither conferred any right on him nor took any from the Government. His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The land continued to be subject to the disposal of Congress and came within the terms of the right of way act as much as if he were making no claim to it. Of course, the presence on public land of a mere squatter does not except it from the operation of such an act containing, as here, no excepting clause.

It is said that by the Act of March 3, 1877, c. 113, 19 Stat. 392, Congress confirmed or provided for the confirmation of pre-emption claims such as this. Assuming, without so deciding, that the act is susceptible of this interpretation, we think it does not disturb rights which were conferred and became vested under the right of way act more than six years before.

It seems also to be thought that the town site law in some way prevented the right of way act from reaching public land within the city limits, but on examining both statutes we are persuaded there is no basis for so thinking. Certainly it was not intended that the right of way should stop at the city limits, and, as the town site law interposed no obstacle, we think the right of way act was intended to and did apply to the public land lying inside those limits over which the railroad had been constructed.

Judgment affirmed.